

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)	
)	
)	
FEATUREGROUP IP)	
)	WC Dkt. No. 07-256
Petition for Forbearance Pursuant to 47 U.S.C. §)	
160(c) from Enforcement of 47 U.S.C. § 251(g),)	
Rule 51.701(a)(1), and Rule 69.5(b))	
)	

**COMMENTS OF TIME WARNER TELECOM, ONE COMMUNICATIONS AND
CBEYOND INC.**

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Time Warner Telecom Inc. (“TWTC”), One Communications, and Cbeyond Inc., by their attorneys, hereby file these comments in opposition to FEATURE GROUP IP’s (“FGIP”) petition for forbearance regarding the application of interstate access charges to VoIP traffic.¹

I. INTRODUCTION AND SUMMARY

The FGIP petition is the latest of a series of forbearance petitions² that seek to ensure that VoIP providers do not pay switched access charges where their traffic

¹ *FEATUREGROUP IP Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(a)(1), and Rule 69.5(b)*, WC Dkt. No. 07-256 (filed Oct. 23, 2007) (“*Petition*”).

² *See, e.g., Level 3 Communications LLC, Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*; WC Dkt. No. 03-266 (Dec. 23, 2003); *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Rate Regulation Pursuant to § 251(g) and for Forbearance from the Rate Averaging and Integration Regulation Pursuant to § 254(g)*, WC Dkt. No. 06-100 (Apr. 27, 2006).

traverses the public switched telephone network (“PSTN”).³ But the Commission need not even address the underlying merits of this petition in light of its numerous procedural errors and facially defective substance. FGIP’s petition should be rejected because (1) it seeks to “clarify” that the ISP Exemption⁴ applies to the subject traffic, even though the FCC has never held that this is the case and may not adopt such a ruling or “clarification” in response to a forbearance petition; (2) the FCC already held in the *Core Order*⁵ that forbearance from Section 251(g) would not subject access traffic to the requirements of Section 251(b)(5) as FGIP suggests, but rather would cause such traffic to be subject to *no rate regulation at all*; (3) FGIP has not and, because the subject traffic will not be subject to rate regulation if its petition is granted, cannot, quantify the effect of its

³ FGIP seeks forbearance for “Voice Embedded IP-based communications, services and applications related traffic that (1) originates in IP format and terminates to the legacy ‘Time Division Multiplexed’ (‘TDM’) circuit switched telephone network; (2) originates on the legacy TDM circuit-switched telephone network and is addressed to an IP-based end point; or (3) originates on the legacy TDM circuit-switched network and terminates on the legacy circuit switched network but (a) is connected to an IP-based platform during the call session and (b) as a result [sic] to use of the IP-based platform, there is a change in content or non adjunct-to-basic enhanced functionalities are offered to the user.” *Petition* at 10-11. The traffic described herein is referred to collectively as “subject traffic.”

⁴ The FCC has concluded that the definitions of enhanced services and information services are almost identical. *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, ¶ 102 (1996), *subsequent history omitted*. The exemption from access charges for these kinds of services was established prior to the addition of the definition of information services in the Communications Act. The exemption has therefore traditionally been referred to as the Enhanced Service Provider Exemption or “ESP Exemption.” For purposes of simplicity, however, the exemption from applying access charges to enhanced and information services is referred to herein as the ISP Exemption.

⁵ *Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, Memorandum Opinion and Order, 22 FCC Rcd 14118 (2007) (“*Core Order*”).

petition on end-user rates and universal service, making an evaluation of the merits of its petition impossible; and (4) Section 10 does not permit FGIP to obtain forbearance from rules and provisions (*i.e.*, Section 251(g)) to which it is not subject.

II. ARGUMENT

A. FGIP May Not Seek A Declaration That the ISP Exemption “Still Applies” To The Subject Traffic In A Petition For Forbearance

In its petition, FGIP argues that the FCC should “hold” that the ISP Exemption from access charges “still applies” to the subject traffic and that “this exemption is carried forward into the intercarrier compensation regime under either § 251(b)(5) or the *ISP Remand Order* (*e.g.*, § 201).” *Petition* at 3. Regardless of the underlying merits of the public policy approach proposed by FGIP, its request is not an appropriate subject for a forbearance petition.

The FCC has never determined that the subject traffic is subject to the ISP Exemption⁶ To the extent that it is asking that the FCC hold that the ISP Exemption “still applies” to such traffic, FGIP seeks a declaratory ruling. However, FGIP may not seek a declaratory ruling through a petition for forbearance. Such a request must be filed separately from a petition for forbearance.⁷ Moreover, such a request is not subject to the

⁶ In response to the nearly identical Level 3 Petition for Forbearance, numerous parties asserted that the ISP Exemption does not apply to VoIP traffic. *See, e.g.*, Verizon *ex parte*, Level 3’s Forbearance Petition Should Be Denied, WC Dkt. No. 03-266, at 21 (Feb. 11, 2005) (“Here, in contrast, Level 3 *does* use the PSTN “in a manner analogous to IXCs”-- to provide a transmission path between two people who wish to speak to one another. Accordingly, the ESP exemption is not applicable and access charges apply under the existing rules.”) (emphasis in original).

⁷ *See* 47 C.F.R. § 1.53 (“In order to be considered as a petition for forbearance subject to the one-year deadline set forth in 47 U.S.C. 160(c), any petition requesting that the Commission exercise its forbearance authority under 47 U.S.C. 160 shall be filed as a separate pleading and shall be identified in the caption of such pleading as a petition for forbearance under 47 U.S.C. Section 160(c). Any request which is not in compliance

statutory time limits that apply to a petition for forbearance. In fact, because FGIP has combined a request for forbearance (from Section 251(g) *et al.*) with a request for affirmative Commission action to clarify what FGIP believes is an existing rule, its petition as filed is defective pursuant to 47 C.F.R. § 1.53, and as such it must be dismissed.

B. Forbearance From Section 251(g) Will Not Provide FGIP With the Relief That It Seeks

In the absence of the requested declaratory relief, FGIP argues that, in the alternative, forbearance from Section 251(g) and related rules for the subject traffic is appropriate. FGIP asserts that, if the FCC “holds” that the subject traffic “is not exempt from access charges” pursuant to the ISP Exemption, “then the Commission must forbear from application of certain express and implied provisions of Section 251(g) of the Communications Act of 1934, as amended . . . , Rule 51.701(b)(1), and, where applicable, Rule 69.5(b).” *Petition* at 3-4. FGIP further argues that, “[i]f the Commission grants [its] Petition for Forbearance, traffic exchange will simply occur pursuant to Section 251(b)(5) of the Act, the Commission’s implementing rules, and state-approved, and in some cases, arbitrated, interconnection agreements or, if the two LECs agree, under the *ISP remand* regime.” *Id.* at 17.

FGIP’s reading of the Act and the effect of its proposed forbearance is incorrect. Less than a year ago, the FCC addressed this *exact same question* in rejecting a petition for forbearance from Core Communications. Like FGIP, Core sought forbearance from Section 251(g) “and related implementing rules” for its access traffic. Core asserted, as

with this rule is deemed not to constitute a petition pursuant to 47 U.S.C. 160(c), and is not subject to the deadline set forth therein.”).

FGIP does here, that forbearance from 251(g) and related rules would subject what was formerly access traffic to the reciprocal compensation provisions of Section 251(b)(5).

See Core Order ¶ 13.

In the *Core Order*, the FCC concluded that forbearance from Section 251(g) would not automatically cause Section 251(b)(5) to apply to the subject traffic. That would only occur if the FCC were to affirmatively promulgate rules to supersede Section 251(g) and place traffic formerly subject to Section 251(g) under section 251(b)(5). *See id.* ¶ 14. Absent such an affirmative ruling, which may not be established in a forbearance proceeding, forbearance from 251(g) for the subject traffic would result in *an absence of a regulated rate for this traffic*. As the FCC explained in the *Core Order*: “Because Section 251(g) explicitly contemplates affirmative Commission action in the form of new regulation, we find that forbearance from Section 251(g) would not give Core the relief it seeks, because the section 251(b)(5) reciprocal compensation regime would not automatically, and by default, govern traffic that was previously subject to section 251(g).” *Id.* The FCC further explained that it had previously found that Sections 251(b)(5) and 251(g) are mutually exclusive: traffic subject to one Section cannot be subject to the other.⁸ Accordingly, as the Commission explained, “[i]f the Commission were to forbear from the rate regulation preserved by section 251(g), there would be no rate regulation governing the exchange of traffic currently subject to the access charge

⁸ *See Core Order* at n.54 (“The Commission previously determined [in the *ISP Remand Order*] that ‘section 251(g) serves as a limitation on the scope of ‘telecommunications’ embraced by section 251(b)(5).’”) (footnote omitted); *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Inter-carrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, ¶ 34 (2001) (“*ISP Remand Order*”) (“We conclude that a reasonable reading of the statute is that Congress intended to exclude the traffic listed in subsection (g) from the reciprocal compensation requirements of subsection (b)(5)”).

regime.” *Id.* Unsurprisingly, the FCC in the *Core Order* held that it would not be in the public interest to strip traffic of any rate regulation at all, and it denied the petition on that basis.⁹ For the same reason, it is not in the public interest to grant the FGIP petition.¹⁰

C. FGIP Fails To Analyze The Implications Of Its Petition For End User Rates And Universal Service, Thereby Making It Impossible To Evaluate The Merits Of The Petition Under Section 10.

The FGIP petition, like the *Core* petition, is as flawed substantively as it is procedurally. In the *Core Order*, the FCC observed that “*Core* provides no analysis of what ‘the real economics of an offering’ might be” in the absence of a regulated rate for what was formerly classified as access traffic. *Core Order* ¶ 16. The absence of a regulated rate would result in substantial, yet unquantifiable, changes to carriers’ access streams, thereby undermining the objective of universal service. As the FCC explained, “many LECs depend on access revenues to maintain affordable rates....Because the record suggests that changes to access revenue streams without more comprehensive intercarrier compensation reform may harm consumers, we find that enforcement of rate regulation under section 251(g) remains necessary[.]” *Id.*

Similarly, if the subject traffic of FGIP and other VoIP providers is no longer subject to access charges or indeed any regulated rate, carriers will likely experience a substantial decline in access revenue. Without corresponding changes in other

⁹ See *Core Order* ¶ 14 (“Due to the absence of any such rate regulation if forbearance were granted, we cannot conclude that enforcement of the rate regulation reserved by section 251(g) and related implementing rules is not necessary to ensure that charges and practices are just and reasonable, and are not unjustly or unreasonably discriminatory.”)

¹⁰ FGIP also seeks forbearance from “the clause of Rule 51.701(b)(1) that excludes from the definition of telecommunications traffic subject to subpart H of Part 51 of the Commission’s Rules ‘telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access[.]’” *Petition* at 24-25.

intercarrier rates or universal service levels,¹¹ LECs of all kinds may seek to increase their end-user rates to make up for the loss in revenue. Such increases could in turn affect universal service by making service unaffordable in certain locations and for certain types of end user.¹² FGIP does not even attempt to analyze these issues, a shortcoming that, as was the case in the *Core Order*, is fatal to its attempt to meet the Section 10 standard.¹³

D. The Terms Of Section 10 Preclude FGIP From Obtaining The Relief It Seeks

FGIP's petition for forbearance is also defective because the Act only permits carriers to seek forbearance from rules that apply to *such petitioning carriers*. Section 10 is crystal clear on this point. Under Section 10(c), only "[a] telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission

¹¹ FGIP argues that applying access charges to the subject traffic "cannot be 'necessary' to achieve the consumer protection objective of universal service because the Act itself authorizes (and, in case of interstate support, prescribes) the use of explicit universal service support[.]" *Id* at 48. Yet the federal universal service system continues to rely on substantial implicit support. *See e.g., Developing a Unified Inter-carrier Compensation Scheme*, Report and Order, 20 FCC Rcd 4685, ¶ 85 (2005) (noting that rate averaging requirements provide access charge subsidies to high cost areas). The elimination of a substantial revenue stream without any consideration of the appropriate adjustments to other intercarrier payments, end-user rates, and universal service payments is contrary to the public interest.

¹² FGIP admits that rate increases will likely result if access charges are reduced. *See id.* at 58-59 ("With respect to interstate subscriber line charge limits, for example, ILECs could, in an appropriate case, petition the Commission for a waiver of such caps, or make an above-band filing under the price cap rules. An ILEC may also seek to initiate new state rates, or to have state or Federal retail rate limits set aside as confiscatory takings."). But it provides no analysis of the consequences of such an increase.

¹³ *See Core Order* at n. 56 ("USTA notes that the petition fails to recognize that changes to one aspect of intercarrier compensation 'cause substantial changes to other forms of intercarrier compensation, universal service support, interconnection arrangements, and end user rates.' Core does not begin to address these impacts, much less show that rates would remain just and reasonable after these changes.").

requesting that the Commission exercise the authority granted under this section with respect to *that carrier or those carriers*, or any service offered by *that carrier or carriers*” (emphasis added). 47 U.S.C. § 160(c). FGIP is not subject to the rules from which it seeks forbearance. Section 251(g) preserves the pre-Act access charge rules as applied to carriers that *provide* access services, not customers of access service: “each local exchange carrier . . . shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with [certain restrictions] that apply to such carrier [prior to the Act] until such restrictions are explicitly superseded[.]” 47 U.S.C. § 251(g). Because FGIP is not providing access service for the subject traffic, but is rather, if anything, a purchaser of access service for that traffic, FGIP may not seek forbearance from 251(g) with respect to the subject traffic.

III. CONCLUSION

For the foregoing reasons, FGIP's petition should be denied.

Respectfully submitted,

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